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No. 73-535

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

FRANCIS R. SALAZAR,
Petitioner,

v.

UNITED STATES OF AMERICA

REPLY TO MEMORANDUM OF THE
UNITED STATES IN OPPOSITION

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Pursuant to Rule 24(4) of the Rules of this Honorable Court, Petitioner respectfully submits this Reply Brief.

I.
THE FACTUAL BACKGROUND RELATED BY THE GOVERNMENT IS INACCURATE AND DISTORTED.

Whether by design or accident, the fact is that the factual background involved herein as related by the Government is inaccurate and distorted as to the following matters:

1. The reference at p. 2 of the Opposition Brief that Petitioner, together with Allen R. Hurt, "dominated" the Board of Directors and Loan and Discount Committee of the bank, is completely and totally inaccurate. Read in context with the immediately preceding sentence, the untrue inference is that Hurt was

neither an officer or Director of said bank.[1] More important, Petitioner owned a minimal number of shares required to be a Director, whereas his co-defendants, Delmar E., Donald S., and Paul E. Cooper, all of whom were members of the Board of Directors, owned either directly or indirectly approximately 80% of the bank's stock, and had power, because of their stockholdings, to remove Petitioner from said Board, Loan and Discount Committee, at any time. Petitioner took no part in the day-to-day operations of the bank, and served on the Board of Directors and Loan and Discount Committee primarily because he was also attorney for the bank. Further, this mislabeled "dominant" Petitioner was the only Director-Defendant of the bank who was not charged with any overt act whatsoever in the conspiracy count of the Superseding Indictment. Further, Petitioner had no loan authority whatsoever and could

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1/ The Superseding Indictment, in several Counts, alleged Allen R. Hurt as being an officer and Director of said bank, COUNT II specifically alleging that he was a ". . . Vice President, and a director. . ." (Vol. I, Appendix p. 64, of the prior Record on Appeal).

have made no loans to any person in any amount.[2]

2. At p. 2 of the Brief in Opposition, whether by design, accident or otherwise, it is stated:

> "They (apparently meaning Petitioner and Allen R. Hurt) misapplied the monies of Rocky Mountain Bank by making loans to their benefit through straw men or through corporations which they owned or were in the process of acquiring, without disclosing their interest in the loans."

This is totally inaccurate and a distortion of the facts. First, Petitioner had no power to make any loans whatsoever

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2/ Allen R. Hurt, a relative to the Defendant Cooper brothers, also owned a minimal or near-minimal amount of stock and had no dominant position on the Board of Directors or Loan and Discount Committee, and for practical purposes, served at the pleasure of the Cooper brothers, who dominated and controlled the bank by virtue of their very large stockholdings therein. Parenthetically, it should be noted that during the trial, Hurt, because of illness, was severed as a defendant and subsequently pled guilty to a mere misdemeanor charge in connection with various transactions in which he allegedly was involved as set forth in the Superseding Indictment.

and he was exonerated by the Court as to any wrongdoing as to the loan transactions involved in Counts VII, VIII and IX and found not guilty by the jury as to the loan transactions involved in Counts III, IV and VI, said exoneration including each and every alleged misapplication involving loans to "corporations".

Further, as to the Government's claim of alleged misapplication of monies by means of loans to "straw men", the only substantive count as to which Petitioner was convicted was Count V involving a loan to Harvey Alpert and Michael Cooper, as to whom the Government refers at p. 2 of its Brief in Opposition as "straw men".

The pertinent definition of "straw men", defined as "Man of straw", as found in Volume II, The Compact Edition of the Oxford English Dictionary (1971) at p. 3085, is as follows:

> "e. Man of straw: A person or thing compared to a straw image; a counterfeit, sham, 'dummy' . . . (c) A person of no substance, esp. one who undertakes a pecuniary responsibility without having the means of discharging it; (d) A fictitious or irresponsible person fraudulently put forward as a surety or as a party in an action."

To characterize Harvey Alpert and Michael Cooper as "straw men" is synonymous to a contention that General Motors, Kuwait, Saudi Arabia and the Queen of England, are bankrupt.

The record irrefutably discloses that Harvey Alpert and Michael Cooper were wealthy and successful residential subdivision developers both prior to and at the time of the Count V $65,000 loan transaction, who had developed three subdivisions of between 1,100 and 1,200 homes and had borrowed construction money averaging $25,000 per home (III Tr. 388), total construction money borrowed being somewhere between $27,400,000 and $30,000,000, their net worth at the time of the Count V loan transaction, as shown by Exhibit 501, being $796,365 and they knew that they were obligated for repayment of the Count V $65,000 loan, Harvey Alpert repeatedly so testifying (III Tr. 379, 389, 390, 391, 395-396).

Further, the Trial Court repeatedly and emphatically recognized:

A. "Alpert was solvent. . .That was a good note financially" (IX Tr. 1556, lines 1 - 3)

B. "Yes, Alpert's note was good . . ." (IX Tr. 1637)

C. ". . .[A]ll of the loans were reported, there is no question about that." (IX Tr. 1538)

D. There was no evidence of any loans that "Were without proper security." (XIII Tr. 2382, lines 21 - 24)

E. There was no question "as to the adequacy of security." (XIII Tr. 2382, line 25, and XIII Tr. 2383, line 2)

F. There was no evidence of causing a loan to be made to a "fictitious borrower". (XIII Tr. 2383, lines 2 - 7)

G. ". . . Maybe this isn't even a crime. . ." (XII Tr. 2349)

H. ". . . /T/his whole indictment, is a little bit peculiar." (XIII Tr. 2433, line 25, and XIII Tr. 2434, line 1)

I. ". . . It is not criminal. . ." for a bank to make loans to its directors. (XII Tr. 2306)

The Trial Judge further stating:

> ". . . I have never had an embezzlement case or misapplication case like this, I admit that, like this one. I am not positive that these people are even charged properly. . . It is a most unusual situation, because the evidence at this point hasn't established even a loss really. . ." (XII Tr. 2349 - 2350; emphasis supplied).[3]

Clearly, from the foregoing, Alpert-Cooper were not "straw men" as the

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3/ Thus, the Trial Judge recognized as the Government contended in its opening statement that its case was based on a "loss" to the bank, which the defendants were unable to refute except by testimonial denials and which the newly discovered evidence conclusively shows to be untrue.

Government insistently contends, as all the evidence was to the contrary.[4]

3. As to the Government's statement at p. 2 of its Opposition Brief that the loan papers indicated the money was for "new business in the construction field", this is a distortion of the facts, as Harvey Alpert, a Government witness, testified said statement was not on Exhibit 501 at the time he signed it (III Tr. 363 - 364, 370) and the Government produced no evidence attributing the subsequent insertion of said statement to any of the Defendants, despite the fact that the Government's handwriting expert, Thomas S. Delaney, actually testified as a handwriting expert to another matter (VIII Tr. 1338-1346).

4. Admittedly, the Count V loan transaction, as alleged in the Superseding Indictment, occurred February 17, 1966, the loan proceeds being paid out on that date. Yet, at pp. 3 - 4 of the Brief in Opposition, references are made as to the manner in which said loan

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4/ Parenthetically, all the testimony and exhibits as to the substantial financial worth of Alpert-Cooper and financial soundness of the Count V loan transaction came from Government witnesses and exhibits, there being no evidence to the contrary. Further, said note was paid in full together with interest at the rate of six and seven per cent for a total of $3,964.66 as to $62,000 of said loan (Exh. 500) and interest at the going rate in the amount of $197 being paid on the remaining $3,000.

was "repaid" and reference is made as to other loans made in October, 1965, July and September, 1966, April, 1967, and the transfer of the real property of Denver Revival Tabernacle in December, 1968. However, none of these transactions have any materiality whatsoever as to whether or not an alleged misapplication occurred on February 17, 1966, the Court in United States vs. Acree, 466 F.2d 1114 (10th Cir., Aug. 22, 1972) at 1118 stating that:

> "The offense occurred and was complete when the misapplication took place. What might have later happened as to repayment is not material . . ."

United States vs. Acree, supra, was decided subsequent to the affirmance of Petitioner's conviction in United States vs. Cooper, 464 F.2d 648 (10th Cir., July 12, 1972). The Government would, if it had its way, have the best of two worlds. First, the Government maintains that evidence of subsequent transactions as to the source of funds for repayment of the Alpert-Cooper loan, including the proceeds from a loan made to Paul Cooper, which was made on March 3, 1967, nearly thirteen months after the Alpert-Cooper loan transaction, and loans made in July, 1966, five months after the Alpert-Cooper loan transaction and September, 1966, seven months after the Alpert-Cooper loan transaction, and April, 1967, approximately fourteen months after the Alpert-Cooper loan transaction, together with the transfer of real property of Denver Revival

Tabernacle which occurred on December 10, 1968, approximately thirty-two months after the Alpert-Cooper loan transaction, are material to sustain a conviction. As to these matters, the Government would ignore United States vs. Acree, supra, decided subsequently to Petitioner's trial and affirmance of his conviction on appeal. Second, although the various subsequent transactions relied upon by the Government tended to show a substantial loss to the bank, the Government maintains as to the newly discovered evidence which conclusively shows the bank sustained no loss whatsoever but will show a considerable profit, the Government reverses its position, and in reliance upon United States vs. Acree, supra, contends this evidence is immaterial.

Obviously, the Government's persistence in relying upon subsequent loan transactions indicating a "loss" to the bank considered in conjunction with the opening statement and closing argument of the trial prosecutor and evidence adduced at trial referred to in the PETITION FOR CERTIORARI herein constitutes a tacit admission that the issue of a "loss" was very material to the theory of the prosecution at trial. It is only because the newly discovered evidence irrefutably and conclusively shows the lack of any "loss" whatsoever that the Government chooses to rely upon the subsequently decided decision of United States vs. Acree, supra.

Clearly, the Government should not be permitted to have the "best of two worlds", leaving the worst to Petitioner.

5. At p. 3 of the Opposition Brief as to the reference to October, 1965,

loans, these loan transactions were loans involved in Counts III and IV of the Superseding Indictment herein, as to both of which Petitioner was acquitted, and it is grossly unfair, inaccurate, and a distortion of the facts for the Government to infer that there was some criminality attached thereto.

The July and September, 1966, loan transactions referred to at p. 3 of the Opposition Brief were the subject matter of Count VI, as to which Petitioner was acquitted, and Count VII, as to which the Court granted a Judgment of Acquittal, and it is grossly unfair, inaccurate, and a distortion of the facts for the Government to infer that there was some criminality attached thereto.

6. At pp. 3 - 4 of the Opposition Brief, reference is made to the December 10, 1968, transaction transferring the real property of the Denver Revival Tabernacle to the bank, in satisfaction of a $275,000 balance owing on certain described loans, the Government contending said real property having only a fair market value of approximately $105,000. THE SUPERSEDING INDICTMENT MAKES NO REFERENCE TO THIS TRANSACTION WHATSOEVER; NO COUNT OF THE SUPERSEDING INDICTMENT CHARGED ANY DEFENDANT WITH "MISAPPLICATION" OR ANY OTHER CRIMINAL OFFENSE IN CONNECTION WITH THIS TRANSACTION. Evidence of this transaction was used solely by the prosecution in an attempt to show a "loss" to the bank.

Whereas, the Government contends said property had a fair market value of only approximately $105,000, the Government's appraisal, Exhibit 121, which was made on May 15, 1969, which purported to show such appraised value,

was excluded from evidence by the Court (VI Tr. 1001), said transfer being made at a certified appraised value of $275,000 as of December 10, 1968 (III Tr. 521, 523, Exh. 116). Further, said transfer complied with C.R.S. 1963, 14-7-1, which provides, in part:

> "(1) A state bank may take property of any kind to satisfy, in whole or in part, or to protect an indebtedness previously created in good faith by it. . ."

and, there was no evidence that the outstanding loans satisfied by the transfer of said real property were not made in good faith.

II.

THE GOVERNMENT HAS FAILED TO RESPOND TO PETITIONER'S REASONS FOR GRANTING THE WRIT.

At para. 1, pp. 4 - 5 of the Opposition Brief, the argument is on the basis of cases cited ". . . that proof of actual loss is not a necessary element of the offense of willful misapplication of bank funds. . ." (Opposition Brief, p. 4). These cases, at most, when considered with cases cited in Petitioner's PETITION FOR A WRIT OF CERTIORARI herein at pp. 10 - 15, disclose a conflict between the various circuit courts either in fact or at least in principle. The "conversion" of bank funds connotes a "loss" of said funds, no matter how temporary. None of the cases cited and relied upon by the Government hold that a "conversion" is not an essential element of the offense of willful misapplication of bank funds, the Government

has totally ignored the necessity of a "conversion" is an essential element.

If United States vs. Acree, supra, and the decision below is construed to hold, as the Government argues, that no "loss" regardless of how temporary is not an essential element of the offense of misapplication of bank funds, then said decision conflicts with every decision of this Court and all lower Federal courts on the subject.

The Government has gone so far in an attempt to expand the scope of the statute as to suggest the possibility that ". . . an intent to injure or defraud the bank. . ." may not be essential to the offense of misapplication under 18 U.S.C. § 656 by stating that ". . . some courts. . ." inferring not "all courts" have so construed the statute. To give viability to this suggestion by denial of the PETITION FOR A WRIT OF CERTIORARI herein that an intent to injure or defraud a bank is not essential to the offense of "misapplication" would not only be contrary to all prior decisions on the point, but would amount to a tacit approval by judicial fiat of carte blanc expansion of the scope of the statute beyond the wildest prosecutor's dreams and far beyond any comprehensible Congressional intent as to the scope of said statute. See United States vs. Docherty, 468 F.2d 930 (2nd Cir., Oct. 31, 1972) and particularly the portion quoted at pp. 14 - 15 of Petitioner's PETITION FOR A WRIT OF CERTIORARI herein.

At para. 2, pp. 5 - 6 of the Brief in Opposition as to the contention that

Petitioner has made ". . . no reference to the record. . ." in support of his contention that evidence was introduced at trial showing The Rocky Mountain Bank had suffered a financial loss, Petitioner would simply refer the Court to the STATEMENT OF THE CASE in his PETITION FOR A WRIT OF CERTIORARI filed herein, and p. 6 in particular. Further, obviously, the Government's view of the transfer of the real property of Denver Revival Tabernacle, which the Government contended was worth $105,000 for $275,000 of outstanding loan balances further indicates a "loss" and was introduced with the intent and purpose by the Government of showing a "loss".

The jury instruction referred to at pp. 5 - 6 of the Brief in Opposition, at p. 6 in defining "intent to defraud" makes reference to a specific intent:

> ". . . to deceive or to cheat, ordinarily for the purpose of either causing some financial loss to another or bringing financial gain to ones self . . . ." (Emphasis supplied).

It is impossible to tell from the record as to what influenced the jury. On the basis of the prosecutor's opening statement, closing argument and evidence of very substantial losses, it is highly probable that the jury found that defendants had an intent to defraud the bank and to "cheat" the bank by causing a "financial loss" to the bank. However, the newly discovered evidence admittedly, irrefutably and conclusively shows Petitioner did not "cheat" or cause a "financial loss" to the bank.

The Government does not respond to Petitioner's contention the question here presented is novel and has never previously been determined by this Court, but should be determined because of its importance in the administration of criminal justice to avoid judicial legislation in violation of the doctrine of separation of powers, nor has the Government responded to Petitioner's contention that the decision below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, as set forth at Sections III and IV of the PETITION FOR A WRIT OF CERTIORARI filed herein, and having failed to deny or respond to these contentions, they should be accepted as tacitly admitted.

CONCLUSION

Petitioner renews his request that a Writ of Certiorari be granted to review the judgment of the United States Court of Appeals for the Tenth Circuit, rendered below.

Respectfully submitted,

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